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PREPARATIONS FOR THE THIRD UNITED NATIONS CONFERENCE TO REVIEW ALL ASPECTS OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

(a) REVIEW OF 15 YEARS OF APPLICATION AND IMPLEMENTATION OF THE SET

(b) FORMULATION OF PROPOSALS FOR THE IMPROVEMENT AND FURTHER DEVELOPMENT OF THE SET OF PRINCIPLES AND RULES

Note by the UNCTAD secretariat

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INTRODUCTION

1. The Intergovernmental Group of Experts, at its thirteenth session, decided 1/ that the fourteenth session of the Intergovernmental Group would be devoted to the preparations for the Third United Nations Conference to Review All Aspects of the Set (the Third Review Conference) in November 1995.

2. In preparation for the Third Review Conference, the UNCTAD secretariat was requested, *inter alia*:

> "To prepare an annotated outline of a study on the scope, coverage and enforcement of competition laws and policies in member States and an analysis of the provisions of the Uruguay Round Agreements relevant to competition policy, including their implications for developing and other countries; (para. 2 (c) of agreed conclusions)
>
> In order to assess the impact of the finalization of the Uruguay Round, in particular the impact on competition policy, to undertake a review of selected cases of RBPs that have an effect in more than one country, in particular developing countries and countries in transition; (para. 2 (d) of agreed conclusions)
>
> To examine the feasibility of developing a bibliography of relevant materials dealing with RBP issues and the implementation of an appropriate data base facility relating to decisions by competition authorities and courts, and to present their preliminary findings relative to each proposal in the course of the fourteenth session of the Intergovernmental Group of Experts." (para. 2 (e) of agreed conclusions)

3. Accordingly, the present note is divided in three chapters, dealing with each of the requests listed above.

Chapter I

ANNOTATED OUTLINE OF A STUDY ON THE SCOPE, COVERAGE AND ENFORCEMENT OF COMPETITION LAWS AND POLICIES IN MEMBER STATES AND ANALYSIS OF THE PROVISIONS OF THE URUGUAY ROUND AGREEMENTS RELEVANT TO COMPETITION POLICY, INCLUDING THEIR IMPLICATIONS FOR DEVELOPING AND OTHER COUNTRIES

4. The study would first briefly review the 15 years of application of the Set of Principles and Rules at the national and international levels (including the general trend towards the adoption of competition laws and extension of their scope), and establish a link between this review and the subject-matter of the study. The mandate, organization and scope of the proposed study would then be described; in particular, it would be noted that, since space constraints would make a comprehensive study impossible, the study would focus on aspects of those laws and policies which had a bearing on deregulatory economic reforms recently adopted, on sectors which were particularly important or which were of particular interest to developing or other countries, or on the provisions of the Uruguay Round Agreements or proposals relating to the issues which might be on the post-Uruguay Round trade agenda. It would also be noted that, throughout the study, relevant data or cases indicating the degree of enforcement in practice would be described, bearing in mind that relaxed enforcement may have the same effect as a formal exemption from the law. The pre-Uruguay Round GATT provisions and decisions relevant to competition policy would then be reviewed.

Chapter I - The Uruguay Round Agreements and competition policy

5. This chapter would describe the provisions of the Uruguay Round Agreements having a bearing upon competition policy, including the agreements on trade-related investment measures (TRIMS), implementation of Article VI of GATT 1994 (relating to anti-dumping measures), subsidies and countervailing measures, safeguards, trade in services, and trade-related aspects of intellectual property rights. Competition principles which appear to be wholly or partially reflected in some of these agreements would also be identified (such as the principle that Governments should not allow private parties to restrain trade and competition in a manner which Governments are themselves proscribed from doing); inconsistencies in this connection among the different agreements would be brought out.

Chapter II - Types of persons or entities covered by competition laws

6. The study would describe types of enterprises that may be granted total or partial exclusions or exemptions in different laws, or may be subjected to stricter scrutiny, because of their ownership, size, market share or structure; these would include small and medium-sized enterprises (SMEs), large firms, firms holding monopoly or dominant positions, or chains of corporations linked through ownership or structure, and public enterprises (PEs). Exemptions granted to trade unions (or in connection with collective wage bargaining) and to the liberal professions (or professional associations) would then be described. The coverage by competition laws and policies of measures by national governmental authorities (such as public procurement, privatization, or the grant of exclusive rights or subsidies) would be reviewed, as would the scope of the defence of Act of State and the principle

of comity in respect of measures by foreign governments. A review would then be undertaken of the extent to which exonerations would be available for persons whose actions were compelled, encouraged or authorized by national governments or foreign governments, or who were granted monopoly or other exclusive rights, or who solicited action by governments.

Chapter III - Types of agreement or practices

7. This chapter would be subdivided into two main sections relating to horizontal and vertical agreements. The general rules regarding per se prohibitions or rule of reason evaluation for horizontal agreements would be briefly set out, and the complete or partial exemptions granted to crisis or depression cartels, rationalization cartels, cartels considered to be in the public interest, joint ventures for research and development, production or marketing, import cartels and export cartels would be described. The general rules regarding per se prohibitions (for resale price maintenance) or rule of reason treatment for vertical agreements would then be briefly described, followed by a focus on exemptions pertaining to intellectual property or know-how, including rules relating to exhaustion of rights, parallel imports and restrictions upon distribution (including franchise agreements), voluntary licensing (including clauses restraining imports or exports) and compulsory licensing for antitrust violations.

Chapter IV - Sectors

8. This chapter (with appropriate cross-references to chapters II and III) would describe exclusions, exemptions or special regimes relating to a number of sectors, including primary sectors (agriculture, mineral resources), manufacturing sectors and specific services such as transportation, financial services, communications or utilities, and services relating to the environment.

Chapter V - Geographical scope

9. This chapter would describe the geographical scope of competition laws. It would be brought out that, in identifying relevant markets, competition authorities usually limit themselves to national markets on the demand side, but often take into account possibilities of supply from international markets. Circumstances in which extraterritorial jurisdiction might be exercised by different countries would also be discussed.

Chapter VI - Conclusions

10. Finally, any direct inconsistencies between the provisions of the Uruguay Round Agreements and the provisions or enforcement of competition laws (or the lack of competition laws), as well as inconsistencies between the competition principles reflected in the Agreements and national laws, would be brought out. The provisions of the Set of Principles and Rules would be referred to in this connection. In the light of the findings of the study, suggestions for action by the Review Conference would be made, such as: (i) the identification of the broad competition principles reflected in the different

Uruguay Round Agreements; (ii) an analysis of how these competition principles could better be reflected, as appropriate, in a mutually consistent or similar manner throughout all the Uruguay Round Agreements; (iii) a review of the implications of these agreements for national competition laws and policies; (iv) an analysis of the extent to which the Set's principles are reflected in these agreements; and (v) a reflection on the implications for UNCTAD's work on competition of the adoption of the Uruguay Round Agreements and of suggestions made by governments for the post-Uruguay Round trade agenda.

Chapter II

PRELIMINARY LIST OF SELECTED CASES OF RBPS THAT HAVE AN EFFECT IN MORE THAN ONE COUNTRY, IN PARTICULAR DEVELOPING COUNTRIES AND COUNTRIES IN TRANSITION

11. The examination of each case listed below would be divided into two parts. The first part would briefly review the facts of the case and the action taken by the competition authorities or courts. This would be followed by a commentary, which would explain the legal background to the case, highlight some issues it raises, taking into account the provisions of the Set of Principles and Rules, and identify some implications in this connection, of the entry into force of the Uruguay Round Agreements. Appropriate cross-references would be made where possible to shorten such commentaries.

A. Selected cases involving horizontal RBPs

1. Cartels

12. *Pfizer Inc. v. Government of India*, 434, U.S. 308: United States case relating to domestic and export cartel among pharmaceutical companies exporting to India, Iran and the Philippines.

13. *Shipping conference cases*: Two cases where the EU Commission intervened against European shipping firms operating between Europe and Zaire, and between Europe and East African countries. 2/

14. *Plastic dinnerware cases*: 3/ Criminal cases involving conspiracy to fix prices of plastic dinnerware in the United States. Canadian authorities provided important assistance in gathering evidence of meetings in Canada during which price-fixing was discussed.

15. *Fax paper cases*: 4/ Cases of price-fixing of thermal fax paper by two Japanese firms in the Canadian and United States markets. A joint investigation was conducted by Canadian and United States competition authorities.

16. *United States v. General Electric Co. and De Beers Centenary AG*: 5/ Criminal case against a United States and a South African firm relating to alleged worldwide price-fixing of industrial diamonds. No verdict had been given in the case at the time of writing.

2. Collusive tendering

17. *Tinplate case* 6/: Suspected collusion among European and Japanese firms in respect of Pakistani Government tender for tinplate.

3. Concerted refusals to deal

18. *Hartford Fire Insurance Co. v. California*, 113 S. Ct. 2891: United States Supreme Court case relating to conspiracy among domestic and British insurers and reinsurers to boycott nonconforming insurers in order to dictate terms on which certain reinsurance would be offered in the United States - important case relating to extraterritorial jurisdiction.

B. Selected cases involving vertical RBPs

1. Predatory and discriminatory pricing

19. *Naso v. Park*, DC SNY, No. 93 Civ. 0915, 4/26/94 7/: Case brought by United States holder of patent for microfilm reels against former customer who acquired similar reels from a manufacturer based in the Republic of Korea and sold them in the United States - allegations of patent infringement, predatory pricing, discriminatory pricing and trade dress infringement - case dismissed.

2. Restrictions involving parallel imports/licences of intellectual property or know-how

20. *Beecham Group v. International Products Ltd.* 8/: Kenyan case where distributor was prevented from importing a branded pharmaceutical because of territorial restrictions imposed by British patentee on a United States licensee from whom the distributor had bought the product.

21. *Pilkington case* 9/: Intervention by the United States Justice Department against restrictions imposed by a British glass manufacturing company in licences for float glass technology accorded to American companies, which would have prevented the licensees from designing and building glassmaking plants overseas.

22. *Microsoft cases*: Coordinated investigation by United States Justice Department and European Commission of monopolistic or unfair practices by United States software manufacturer in licensing agreements. The cases were settled through a consent decree in the United States 10/, and the acceptance of undertakings by the European Commission from Microsoft. 11/

C. Selected mergers

23. *Tea case* 12/: Merger by two British tea companies in London (with subsidiaries in Kenya and Pakistan) which led to rises in prices of tea imported into Pakistan from Kenya.

24. *MAN/Sulzer* 13/: Prohibition by German authorities of acquisition by German firm MAN, of marine diesel division of Swiss firm, Sulzer, which would have reduced the number of firms selling large diesel engines for ships worldwide from three to two.

25. *Gillette/Wilkinson* 14/: A large number of competition authorities intervened to prevent this proposed acquisition by the British subsidiary of Gillette (a United States company) of a stake in a Netherlands company which was the sole shareholder of Wilkinson, which would have resulted in the two companies obtaining almost a world monopoly in the wet-shaving products market.

26. *Allison Transmission cases* 15/: Both the German and United States competition authorities intervened against this proposed acquisition by a German firm, Zahnradfabrik Friedrichshafen (ZF), of the Allison Transmission Division of General Motors Corp. of the United States, which would have strengthened ZF's dominant position on world markets for automatic transmissions for large vehicles.

D. Impact of the finalization of the Uruguay Round

27. Overall conclusions regarding the issues raised by these cases and the impact on competition policy of the Round's finalization.

Chapter III

PRELIMINARY FINDINGS RELATIVE TO THE FEASIBILITY OF DEVELOPING A BIBLIOGRAPHY OF RELEVANT MATERIALS DEALING WITH RBP ISSUES, AND THE IMPLEMENTTION OF AN APPROPRIATE DATABASE FACILITY RELATING TO DECISIONS BY COMPETITION AUTHORITIES AND COURTS

28. The UNCTAD secretariat has examined the feasibility of developing a bibliography and database, and a summary of its preliminary findings is given below.

A. Bibliography

1. Scope

29. The bibliography would include data on books and articles on competition policy and RBP issues published by national competition authorities, international organizations, universities and research institutes. If available, the bibliography could also include abstracts of some of the studies and articles deemed important by national authorities and subsequently brought to the attention of the UNCTAD secretariat. The bibliographical data could be listed by author (both personal and corporate) as well as by subject category.

30. For the purpose of data collection, national competition authorities and relevant international organizations and agencies might wish to cooperate with the UNCTAD secretariat, by making available their own bibliographical data networks, which could be a valuable source of additional information.

31. The United Nations Bibliographic Information System (UNBIS) and major international library catalogues covering relevant materials would also be used. Special efforts should be made to include in the bibliography publications not only from developed countries, but also from developing countries and countries in transition.

2. Feasibility

32. The RBP bibliography could be developed as a PC application, using relational database management software. It could be installed on stand-alone PCs or in PC networks, and down-loaded on to diskette for distribution to outside parties.

33. The major problem associated with such a system is the availability of data in machine-readable form. Since data collection is a time-consuming exercise, there should be a constant and efficient interface between UNCTAD and national competition authorities to help the data collection process to be implemented rapidly.

B. Database of decisions by competition authorities and courts

1. Scope

34. As requested by the IGE, the database would contain the decisions of competition authorities and courts. It would be a PC-based information system providing for the encoding and retrieval of information, and built on UNCTAD's vast experience in developing information systems.

2. Feasibility

35. The immediate aim would be to prepare a prototype database, which could then be expanded with detailed data from various sources.

36. In order to be of use to researchers and policy makers, the database could have summaries of the texts of important decisions rather than mere references to them. The data would be made available for access according to a number of parameters (data elements) to be defined at a later stage.

37. In the preparation stage, the UNCTAD secretariat could usefully benefit from the experience of other international organizations or national authorities which have set up similar databases. The UNCTAD secretariat will contact other bodies experienced in this area to learn more about the methodology that they have used in organizing their databases.

38. Like the bibliography system, the database could be implemented as a PC application using relational database management software. Likewise it could be installed on stand-alone PCs or in PC networks and be down-loaded on to diskette or other electronic media (such as CD-ROM) for distribution to outside parties. Here again, the major problem will be the availability of data in machine-readable form. In terms of time and staff resources, therefore, some investment would be required. An indicative cost estimate is given below.

3. Proposed time-frame for initial development

39. Providing the necessary resources are made available, work could begin immediately on the collection of data, and a prototype system could become operational in six months. The system would be revised periodically to take account of the experience in data collection and any possible changes of priorities. The possibility of networking with other institutions that collect relevant information in order to provide and access information in a more efficient and cost-effective manner would be explored.

C. Estimated budget for bibliography and database

		US dollars
I.	Bibliography	
(a)	Setting up the system (programmer)	5 000
(b)	Feeding the system (data entry)	5 000
(c)	Hardware and software	10 000
(d)	Sundries	5 000
		25 000
II.	Database	
(a)	Setting up the system (consultant and programmer)	15 000
(b)	Feeding the system (research assistant (2 months))	10 000
		25 000

Note: Hardware and software purchased under I would be used in II as well.

Notes

1/ Agreed conclusions of the Intergovernmental Group of Experts on Restrictive Business Practices at its thirteenth session, as contained in TZD/B/RBP/L.65.

2/ See "ECU 15 million in fines are imposed on shipping firms", Antitrust and Trade Regulation Report, 2 April 1992, p. 422, and Commission des Communautés Européennes, "XXIIIe Rapport de la Commission sur la politique de la concurrence", 1993, p. 159.

3/ United States v. Izzi, Crim. No. CR94-00243, United States v. Plastics Inc., Crim. No. CR94-00245, United States v. Polar Plastics Mfg. Ltd., Crim No. CR94-00246, United States v. Comet Products Inc., Crim No. CR94-00247.

4/ In the United States, the case was United States v. Kanzaki Specialty Papers Inc., Crim. No. 94-10176 NMG.

5/ No. CR-2-94-019.

6/ See UNCTAD, "Annual report 1989 on legislative and other developments in developed and developing countries in the control of restrictive business practices" (TD/B/RBP/61).

7/ Reported in Antitrust and Trade Regulation Report, vol. 66, p. 548, 12 May 1994.

8/ Referred to in D. Gladwell, "The exhaustion of intellectual property rights", European Intellectual Property Review, vol. 12, p. 368, 1990.

9/ See "Pilkington bows to US pressure on process licensing", Financial Times, 27 May 1994.

10/ *U.S. v. Microsoft Corp., DC*, No. 94-1564 LFO, 15 July 1994.

11/ See "Microsoft settles accusations of monopolistic selling practices", Antitrust and Trade Regulation Report, 21 July 1994.

12/ See "Corporate behaviour in restraint of trade in goods and services in Pakistan", consultant report prepared for the UNCTAD secretariat by A. Riaz (UNCTAD/ITP/96), December 1991.

13/ Press release by German Federal Cartel Office, 25 August 1989.

14/ See for example Federal Cartel Office press release of 23 July 1992.

15/ See Federal Cartel Office press release of 25 November 1993.